

MEMORANDUM OF AGREEMENT BETWEEN

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION & ENERGY
AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I. GENERAL

A. Purpose

This Memorandum of Agreement (hereinafter "Agreement") between the New Jersey Department of Environmental Protection & Energy (NJDEPE) and the United States Environmental Protection Agency (Region II) (EPA), is entered into to enable the State of New Jersey to carry out the policies, regulations and procedures necessary to administer the permit program established pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, hereinafter referred to as "the 404 program," thereby fulfilling the requirements of the Freshwater Wetlands Protection Act, P.L. 1987, c. 156. This agreement does not create any substantive standards relating to any aspect of the permit program or impose any legal obligations on the public.

B: Parties and Effective Date

(1) This agreement is entered into by the State of New Jersey through the Commissioner of the NJDEPE ("Commissioner") and the United States Environmental Protection Agency through the Regional Administrator of Region II ("Administrator").

(2) This agreement shall be executed by the Commissioner and the Administrator and shall become effective at the time the NJDEPE's authorization to administer the 404 program takes effect, which shall be the date set out in the Federal Register of EPA's decision to approve the State's application to administer the 404 program.

(3) Nothing in this agreement shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under the CWA, nor shall it restrict NJDEPE's enforcement responsibilities under New Jersey law.

(4) This agreement will remain in effect until such time as NJDEPE's program authorization is modified or withdrawn by EPA or is voluntarily transferred by NJDEPE to the Army Corps of Engineers (ACOE) according to the criteria and procedures established in 40 C.F.R. 233.53.

C. Modification

This agreement may be modified pursuant to 40 C.F.R. 233.16 upon the initiative of either party. Amendments to this

agreement shall be in writing, and shall be effective upon the signature of both parties.

D. Confidentiality

(1) All of the information EPA transfers to NJDEPE will be provided subject to the procedures and limitations of 40 C.F.R. 233.3.

(2) Any information obtained or used in the administration of the State Program shall be available to EPA without restriction. If information has been submitted to NJDEPE under a claim of confidentiality, NJDEPE must inform EPA of such claim. All information submitted by NJDEPE subject to a claim of confidentiality shall be treated in accordance with the procedures of 40 C.F.R. Part 2., 40 C.F.R. 233.3(c) and N.J.A.C. 7:7A-11.4.

E. Computing Time Periods

In computing any period of time prescribed by this agreement, the day on which the designated period of time begins shall not be included. Saturdays, Sundays, and legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

F. Legal Framework

(1) The legal basis for the State's assumption of the 404 program is provided by Section 404(g)(1) of the Clean Water Act, which authorizes the Administrator of the EPA to approve state administered programs for regulating the discharge of dredged or fill material into State regulated waters as defined at 40 C.F.R. 232.2, and by N.J.S.A. 13:9B-27 of the Freshwater Wetlands Protection Act which mandates the State of New Jersey to take all appropriate actions to secure the assumption of the permit jurisdiction exercised by the U.S. ACOE pursuant to the Federal Act.

(2) The implementing regulations concerning assumption of the 404 program under the CWA are found at 40 C.F.R. 230, 232 and 233.

(3) The State's legal authority for the activities required for assumption is provided by N.J.S.A. 13:9B-1 et seq., and N.J.S.A. 58:10A-1 et seq., which authorizes the NJDEPE to issue permits for the discharge of dredged or fill material into waters of the United States within the boundary of New Jersey or subject to its jurisdiction.

(4) Prior to the assumption of the 404 program by NJDEPE, the North Atlantic Division of the United States Army Corps of

Engineers (Corps) has administered the 404 program in New Jersey. The Division Engineer of the North Atlantic Division has been delegated the authority to enter into a Memorandum of Agreement which will transfer the program to NJDEPE pursuant to CWA requirements.

(5) NJDEPE's Memorandum of Agreement with the Corps stipulates joint permit processing responsibilities for activities which involve non-assumable waters, as well as transfer of permitting authority from the Corps to NJDEPE. This agreement identifies the State waters to be regulated, joint processing procedures, general permit procedures, transfer of records, protection of navigation or anchorage, permitting for Corps water resource projects and permitting for emergency work. The legal effect of the Memorandum of Agreement between the NJDEPE and the Corps is conditioned upon approval of the State's program and of this agreement between NJDEPE and the EPA.

G. Policy Statement

(1) Each of the parties to this agreement is responsible for ensuring that its obligations under the CWA are met. Upon approval of the State's application from EPA, NJDEPE assumes primary responsibility for implementing certain provisions of the 404 program within New Jersey's boundaries. This will be accomplished under the authority of State law. EPA retains its responsibility to ensure full and faithful execution of the requirements of the CWA, including direct implementation in the event NJDEPE does not act in accordance with the CWA, or does not act in a timely fashion. The Commissioner and the Administrator agree to maintain a high level of cooperation and coordination between their respective staffs and to work in partnership to assure successful and effective administration of the 404 program.

II. PERMIT APPLICATION REVIEW AND PERMIT ISSUANCE

A. Lead Agency Responsibility for 404 Program

(1) NJDEPE is the lead agency in New Jersey for administering the State Program. The Commissioner shall administer the State Program as approved by EPA, using this MOA, applicable state and federal laws, and any separate working agreement which shall be entered into with the Administrator as necessary for full administration of the program. The strategies and priorities for permit review, compliance monitoring and enforcement of permits shall be established by the Commissioner and shall be reviewed annually by the Administrator.

(2) NJDEPE is responsible for expeditiously drafting, circulating for public review and comment, issuing, modifying, reissuing and terminating or denying State Program permits for all discharges of dredged or fill material into state regulated waters, as defined at 40 C.F.R. 232.2. The Commissioner has

delegated the State Program to Environmental Regulation subject to the provisions of N.J.A.C. 7:1-1.3. NJDEPE will use procedures and policies found in N.J.A.C. 7:7A and N.J.A.C. 7:14 in its administration of the program.

B. Waiver of Review

(1) Pursuant to Section 404(k) of the CWA, EPA waives the requirements of Section 404(j) regarding Federal review of NJDEPE permit applications for all but the following categories of permits:

- a. Draft general permits;
- b. Discharges with reasonable potential for affecting Federally listed or proposed endangered or threatened species as determined by the United States Fish and Wildlife Service;
- c. Discharges of dredged or fill material which have the potential for adverse impacts on the waters of a state other than New Jersey;
- d. Discharges known or suspected to contain toxic pollutants as identified by section 307(a)(1) of the CWA; hazardous substances identified pursuant to Section 311 of the CWA and Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601 et seq.; toxic substances as defined by Section 3 of the Toxic Substances Control Act, 15 U.S.C. 2601 et seq.; and hazardous waste as defined by Section 1004(5) of the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.;
- e. Discharges located in the proximity of a public water supply intake;
- f. Discharges within critical areas established under State or Federal law, including but not limited to National and State parks; fish and wildlife sanctuaries or refuges; National and historical monuments; wilderness areas and preserves; sites identified or proposed under the National Historic Preservation Act; and components of the National Wild and Scenic Rivers system;
- g. The filling of 5 or more acres of freshwater wetlands or State open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of five or more acres of freshwater wetlands or State open waters;
- h. Culvert enclosures of more than 100 feet with more than 200 cubic yards of fill in waters regulated by NJDEPE;
- i. Channelization of more than 500 feet of a river or stream.

(2) The Administrator may terminate waiver of the review of categories of permit applications outlined in this MOA as well the waiver of review of specific permit actions at any time by sending the Commissioner written notice of implementation.

(3) The Department may request review by the EPA of specific projects based on the potential for significant adverse environmental impacts.

C. Review Procedures

(1) The Commissioner shall promptly transmit to the Administrator:

a. A copy of the public notice for any complete permit applications received by NJDEPE, except those for which permit review has been waived under this agreement. NJDEPE shall supply the Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

b. A copy of a draft general permit whenever NJDEPE intends to issue or amend a general permit. The draft general permit shall comply with the requirements of 40 C.F.R. 233.21.

c. Notice of every significant action taken by NJDEPE related to the consideration of any draft general permit or permit application except those for which federal review has been waived.

d. A monthly report outlining all completed permit decisions and jurisdictional determinations. NJDEPE should supply the Administrator with a copy of any permit or jurisdictional determination whenever requested by EPA.

(2) If the information provided is inadequate to determine whether the permit application or draft general permit meets federal requirements, the Administrator may, within 30 days of receipt of the information, request the Commissioner to transmit to the Administrator the complete record of the permit proceedings before NJDEPE, or any portion of the record, or any other information, including a supplemental application, that the Administrator determines is necessary for review.

(3) Unless review has been waived under this agreement, the Administrator shall provide a copy of each of the documents specified at 40 C.F.R. 233.50 to the Corps, FWS, and the United States National Marine Fisheries Service (NMFS) in accordance with the procedures at 40 C.F.R. 233.50.

(4) If the Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Commissioner's failure to accept the recommendations of an affected state, the Administrator shall so

notify the Commissioner in accordance with 40 C.F.R. 233.50. If the Commissioner has been so notified, the Commissioner and the Administrator shall follow the procedures set forth at 40 C.F.R. 233.50.

(5) In the event that NJDEPE neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Corps shall process the 404 permit application.

D. Prohibitions on Issuing Permits

No permit shall be issued by the Department in the following circumstances:

(1) When permit does not comply with the requirements of the CWA or regulations thereunder, including the Section 404(b)1 Guidelines (40 CFR Part 230).

(2) When the Regional Administrator has objected to the issuance of the permit under 40 C.F.R. Part 233.50 and the objection has not been resolved to the Regional Administrator's satisfaction.

(3) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under Section 404(c) of the CWA, or when the discharge would fail to comply with a restriction imposed thereunder.

(4) If the Corps determines, after consulting with the Coast Guard, that anchorage and navigation of any navigable waters would be substantially impaired.

III. ENFORCEMENT

A. EPA will retain responsibility for all pending enforcement actions for which EPA has requested lead agency status prior to assumption.

B. State Enforcement

NJDEPE will take timely and appropriate enforcement action against persons in violation of the State Program permit conditions and against persons conducting unauthorized discharges of dredged or fill material into state regulated waters pursuant to N.J.A.C. 7:7A-15.

C. EPA Enforcement Oversight

(1) In instances where the EPA determines that the NJDEPE has not initiated timely and appropriate enforcement action regarding a State Program permit violation or an unauthorized discharge, EPA may proceed with any or all of the enforcement options available under Section 309 of the CWA.

(2) Prior to proceeding with federal enforcement action against a State Program permit violator or an unauthorized discharger, and for purposes of providing notice only, EPA shall inform NJDEPE that federal enforcement action is to be initiated forthwith. This notification shall be in the form of a telephone or written communication by the Administrator to the Commissioner or a designee. Except in the exercise by EPA of its emergency power under Section 504 of the CWA, such notification shall be provided in all cases of federal enforcement action regardless of the existence or extent of previous communication between EPA and NJDEPE on the matter. It is expected that preliminary staff discussions will take place between EPA and NJDEPE representatives before institution of federal enforcement action. If EPA fails to provide notice such failure does not invalidate EPA's ability to enforce.

D. Joint Enforcement

(1) Either agency may request the other to take independent or joint enforcement action on any case. Any such request shall be in writing and a response shall be given within 30 days of receipt. Where there may be an imminent and substantial danger to human health or welfare or the environment, such a request may be made by telephone or other means. The details of enforcement coordination will be specified in a yearly NJDEPE/EPA agreement, which will be drafted following state program approval and reviewed annually. The NJDEPE/EPA agreement shall not override the terms of this agreement.

IV. Program Maintenance

A. Duty to Maintain Program compatibility

(1) NJDEPE's State Program will be conducted in conformance with applicable regulations and definitions found in 40 C.F.R. Parts 230 and 233, and in N.J.A.C. 7:7A, unless provided otherwise in this agreement. Whenever any regulations found in 40 C.F.R. Parts 230 and 233 have been revised or amended in a manner which affects the State Program, the Administrator shall so notify the Commissioner. However, nothing precludes the State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope than that required by 40 C.F.R. Parts 230 and 233.

(2) EPA will keep NJDEPE informed of the content and meaning of federal statutes, regulations, guidelines, standards, policy decisions, directives, and any other factors that affect the State Program. EPA will forward copies of all guidance documents, as they become available, to NJDEPE. Guidance documents are to be sent to: Land Use Regulation Program, Environmental Regulation, New Jersey Department of Environmental Protection and Energy, CN 401, 501 East State Street, Trenton, New Jersey 08625. EPA will also provide general technical

guidance to NJDEPE. EPA will share with NJDEPE any national reports developed by EPA from the data obtained through state reporting requirements. EPA shall provide NJDEPE with all guidance and technical resource documents unless EPA is notified that guidance and technical documents are being sent directly to NJDEPE by EPA headquarters.

(3) The Commissioner agrees to inform the Administrator of any proposed or adopted program changes which would affect NJDEPE's ability to implement the authorized program, any proposed transfer or responsibility to another agency, and any other modifications which are significant to administration of the program.

B. EPA Oversight of State Program

(1) The Administrator will assess the administration and enforcement of the State Program on a continuing basis for equivalence and consistency with the CWA, this agreement, and all applicable federal requirements and policies and for adequacy of enforcement. This assessment will be accomplished by : (1) timely EPA review of information submitted by NJDEPE in accordance with this agreement; (2) permit overview; (3) compliance and enforcement overview; and (4) annual review of NJDEPE program activities.

(2) The Administrator may also consider, as part of this regular assessment, written comments about NJDEPE's program administration and enforcement that are received from regulated persons, the public, and federal, state and local agencies. Any response by the Administrator to the public comment will be preceded by notice to the Commissioner in accordance with this paragraph. Copies of any such comments received by the Administrator will be provided to the Commissioner within thirty (30) days of their receipt by EPA. The Commissioner will have 30 days from receipt of the copies of such comments to provide the Administrator with NJDEPE's response. The Administrator will take NJDEPE's response into account prior to issuing a response to regulated persons, the public, or federal, state or local agencies. In addition, the Commissioner will be copied on all responses issued by the Administrator within 30 days of their issuance.

C. Annual Reports

(1) Within 90 days after completion of the State's fiscal year (June 30), the Commissioner shall submit to the Administrator a draft annual report in accordance with the requirements of 40 C.F.R. 233.52.

(2) The State shall make the draft annual report available for public inspection.

(3) Within 60 days of receipt of the draft annual report, the Administrator will complete review of the draft report and

transmit comments, questions, and/or requests for additional evaluation and/or information to the Commissioner.

(4) Within 30 days of receipt of the Administrator's comments, the State will finalize the annual report, incorporating and/or responding to the Administrator's comments, and transmit the final report to the Administrator.

(5) Upon acceptance of the annual report, the Administrator shall publish notice of availability of the final annual report.

D. Annual Review and Performance Evaluation

(1) EPA shall conduct annual performance evaluations of the State Program from NJDEPE's annual reports and other requested information. The performance evaluation shall determine the State Program's consistency with the program as approved, and with applicable regulations, guidance and policies. The annual review will be conducted within 60 days of receipt by the Administrator of the final State annual report, and will include a review of expenditures of federal funds.

(2) EPA shall submit a report of the evaluation findings to the NJDEPE outlining any perceived deficiencies in program performance and making recommendations for improving NJDEPE operations. If NJDEPE is requested by EPA to respond to the EPA program evaluation report, NJDEPE will have 60 days from the date of receipt of the report to respond in writing. NJDEPE's response shall address each EPA recommendation specifically.

(3) Either party to this agreement may call a meeting to discuss NJDEPE's annual report, the annual review process, and/or the performance evaluation.

E. Procedures for Revision of the State Program

(1) Either EPA or NJDEPE may initiate program revision. Program revision may be necessary when the controlling federal or state statutory or regulatory authority is modified or supplemented or for other reasons. The NJDEPE shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.

(2) Revision of the State Program shall be accomplished in accordance with the requirements of 40 C.F.R. 233.16 and of applicable State law.

F. Transfer or Withdrawal of State Program

(1) The EPA may withdraw program approval from NJDEPE upon a finding that the State Program no longer complies with the requirements of the CWA and implementing regulations, and that NJDEPE has failed to take corrective action.

(2) The criteria and procedures for withdrawal of a state program, found at 40 C.F.R. 233.53, shall govern program withdrawal.

(3) NJDEPE may voluntarily transfer the State Program to the Corps using the procedures at 40 C.F.R. 233.53(a).

VII. Signatures

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

Date: 3-4-97 By: Scott A. Weiner
Scott A. Weiner, Commissioner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION II

Date: 6/15/93 By: William Muszynski
William Muszynski
Acting Regional Administrator

2/12/98